

² The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedures* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal.

FACTUAL HISTORY

Appellant, then a 54-year-old materials handler, filed a traumatic injury claim (Form CA-1) alleging that on June 12, 1996 he sustained a right shoulder injury when picking up a carton that was packed incorrectly when the cart rolled out of his hands. In attempting to catch the cart, he felt a sharp pain in his right shoulder. OWCP accepted the claim for right shoulder sprain and C4-5 and C5-6 cervical disc syndrome/radiculopathy. Appellant underwent a C4-5 and C5-6 surgical procedure in August 1996, C4-5 and C5-6 anterior cervical discectomy and fusion on August 1, 1997. In April 1998 he returned to modified duty. Appellant then underwent authorized C4-5 decompression and fusion surgery on April 18, 2003. OWCP paid him wage-loss compensation on the periodic rolls for temporary total disability commencing April 20, 2003.³

On December 9, 2019 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions, to Dr. John H. Welborn, Jr., a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the status of his accepted conditions and whether he was able to return to work.

In a report dated January 27, 2020, Dr. Welborn indicated that he had reviewed the SOAF and noted accepted conditions for right shoulder sprain and cervical disc syndrome at C4-5. He related appellant's physical examination findings noting observed tenderness in the paraspinal muscles and restricted range of motion. Dr. Welborn indicated that appellant also suffered from degenerative disc disease. He opined that appellant continued to suffer from residuals of the accepted injury, but was capable of working a sedentary or light-duty job. Dr. Welborn completed a work capacity evaluation form (Form OWCP-5c) of even date noting that appellant was capable of performing sedentary and light-duty work with restrictions of no lifting, pulling, or carrying more than 20 pounds for more than eight hours a day.

On August 29, 2020 the employing establishment offered appellant a motor vehicle operator position. The duties of the position included operating one or more two axle vehicles including sedans and passenger vehicles to transport authorized personnel throughout the installation. The vehicles would be driven on regularly-established schedules and standard routes throughout the installation, or on specific trip assignments. Appellant would be provided with a two-way radio to get instructions and transmit completion to the dispatcher. The job also required completion of trip tickets, preventive maintenance records, and other duties as assigned. It noted that all necessary training would be provided to ensure successful performance the required duties of the position. The physical requirements of the position involved light physical effort in reaching, bending, turning, or moving hands, feet, arms, and legs to operate foot and hand controls. The regular work hours were 7:00 a.m. to 3:30 p.m., with scheduled days off on Saturday and Sunday. The position was located at the DLA Distribution establishment in San Joaquin, California. Appellant was given 10 calendar days to accept or reject the position.

On September 25, 2020⁴ appellant accepted the job offer.

³ The employing establishment removed appellant from his position as materials handler effective May 21, 2003.

⁴ Appellant submitted two forms accepting the job offer. One was dated October 3, 2020 and the second had the date of September 25, 2020 written over the date of October 3, 2020.

In a November 17, 2020 letter, the employing establishment noted that appellant had not reported to work.

The employing establishment emailed appellant on November 25, 2020 and sent a letter dated November 30, 2020 advising him of the documentation required for the offered position. The documentation required included a copy of his driver's license and a drug testing letter.

On December 17, 2020 OWCP informed appellant that it found the August 29, 2020 job offer suitable and in accordance with the work restrictions provided by Dr. Welborn. It noted that the employing establishment confirmed that the position remained open and available to him. OWCP advised appellant that an employee who refuses an offer of suitable work without reasonable cause is not entitled to further compensation for total wage loss. It afforded him 30 days to accept the assignment and report to duty or provide a written explanation of his reasons for not accepting the assignment.

On January 27, 2021 the employing establishment confirmed that the August 29, 2020 job offer remained available.

On April 16, 2021 OWCP requested that Dr. Welborn review whether the offered position of motor vehicle operator was within appellant's work restrictions.

In a May 24, 2021 supplemental report, Dr. Welborn reviewed the offered position of motor vehicle operator and found it within his work restrictions.

On June 10, 2021, in a letter to OWCP, the employing establishment confirmed that the August 29, 2020 job offer remained available.

By letter dated June 17, 2021, OWCP notified appellant that his reasons for refusing to report to the position were not valid and the medical evidence established that the offered position was within his work restrictions. It provided him 15 days to accept the position or his entitlement to wage-loss compensation benefits would be terminated. OWCP advised appellant that the offered position remained available.

On June 29, 2021 appellant advised OWCP that he had not refused the offered position, but was instead waiting for the employing establishment to contact him.

On July 2, 2021 the employing establishment advised OWCP that appellant failed to report for the offered position. It confirmed that the August 29, 2020 job offer remained available.

On July 9, 2021 OWCP received appellant's June 29, 2021 statement regarding interactions with the employing establishment regarding the offered position. Appellant stated that on September 25, 2020 he spoke with D.D., at the employing establishment, regarding reporting to work on September 28 at 7:00 a.m. He related that D.D. was "caught off guard" and advised appellant to hold off until someone got back to him. Additionally, appellant related that he went to the base on July 2, 2021 but was not allowed on base by the guard because he did not have an appointment to enter the base. He related that he tried calling the number given by the guard, but there was no response to his calls.

On July 12, 2021 OWCP received copies of email correspondence dated November 25, 2020 and January 27, 2021 between employing establishment representatives regarding

appellant's return to work status. On November 25, 2020 the employing establishment advised that it resent an email with instructions about the offered position and advised that appellant was not reachable by telephone. In the January 27, 2021 email correspondence, it advised that appellant had not returned any calls or emails and had not completed his drug test or the documentation required to get onto the base. OWCP also received an April 12, 2021 email from the employing establishment to appellant advising that it had not heard from appellant in sometime as to whether he was going to accept the job offer. Appellant was advised that he should call or email so that the employing establishment could assist appellant in completing the required conditions of employment.

On July 13, 2021 the employing establishment informed OWCP that drug testing and a background check had been scheduled, which it noted was required for the offered position, but that appellant failed to attend the testing or complete the background check. It further noted that appellant had not contacted the employing establishment.

By decision dated July 29, 2021, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, effective July 18, 2021, as he had refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2). It noted that he had not accepted the offered position following its 15-day letter. OWCP determined that the opinion of Dr. Welborn as provided in his January 27, 2020 report and May 17, 2021 addendum constituted the weight of the evidence and established that appellant could perform the duties of the offered position.

LEGAL PRECEDENT

Under FECA,⁵ once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.⁶ Section 8106(c)(2) of FECA provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation.⁷

Section 10.517 of FECA's implementing regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of proof to show that such refusal or failure to work was reasonable or justified.⁸ Pursuant to section 10.516, the employee shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation.⁹

To justify termination of compensation, OWCP must show that the work offered was suitable, that appellant was informed of the consequences of his or her refusal to accept such

⁵ *Supra* note 1.

⁶ *M.S.*, Docket No. 20-0676 (issued May 6, 2021); *D.M.*, Docket No. 19-0686 (issued November 13, 2019); *L.L.*, Docket No. 17-1247 (issued April 12, 2018); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁷ *Supra* note 1 at § 8106(c)(2); *see also M.S.*, *id.*; *M.J.*, Docket No. 18-0799 (issued December 3, 2018); *Geraldine Foster*, 54 ECAB 435 (2003).

⁸ 20 C.F.R. § 10.517.

⁹ *Id.* at § 10.516; *see B.H.*, Docket No. 21-0366 (issued October 26, 2021); *M.S.*, *supra* note 6; *Ronald M. Jones*, 52 ECAB 406 (2003).

employment, and that he or she was allowed a reasonable period to accept or reject the position and submit evidence or provide reasons why the position is not suitable.¹⁰ Section 8106(c)(2) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.¹¹

ANALYSIS

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective July 18, 2021, because he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

On August 29, 2020 the employing establishment offered appellant a position as a motor vehicle operator and on July 29, 2021 OWCP determined that the position was suitable. The duties of the position included operating sedans and passenger vehicles to transport authorized personnel throughout the installation on regularly established schedules and standard routes or on specific trip assignments. The job also required using a two-way radio to get instructions and advise the dispatcher of completion of the trip, completion of trip tickets, preventive maintenance records, and other duties as assigned. The physical requirements of the position involved light physical effort in reaching, bending, turning, or moving hands, feet, arms, and legs to operate foot and hand controls.

The August 29, 2020 job offer was within the restrictions as prescribed by the second opinion physician, Dr. Welborn. In reports dated January 27, 2020 and May 24, 2021, he reported that appellant could perform sedentary or light-duty work for eight hours per day with restrictions including up to 20 pounds of lifting, pulling, or carrying. OWCP properly accorded the weight of medical opinion to the reports of Dr. Welborn who opined that appellant was capable of returning to sedentary work. Dr. Welborn based his opinion on a proper factual and medical history. He also provided appropriate physical examination findings. The Board thus finds that OWCP properly relied on his reports to determine that the offered position was suitable.¹²

The Board further finds that OWCP properly followed its established procedures prior to the termination of appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2), including providing him with an opportunity to accept the position offered by the employing establishment after informing him that his reasons for initially refusing the position were not valid.¹³

For these reasons, OWCP properly terminated appellant's wage-loss compensation and entitlement to a schedule award, effective July 18, 2021, because he refused an offer of suitable work.¹⁴

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4 (June 2013). See also *M.S., id.*; *R.A.*, Docket No. 19-0065 (issued May 14, 2019).

¹¹ *M.S., id.*; *C.M.*, Docket No. 19-1160 (issued January 10, 2020); see also *Joan F. Burke*, 54 ECAB 406 (2003).

¹² *B.H., supra* note 9; *M.S., id.*; *S.V.*, Docket No. 19-0349 (issued October 18, 2019).

¹³ *B.H., id.*; *K.S.*, Docket No. 19-1650 (issued April 28, 2020); *C.H.*, Docket No. 17-0938 (issued November 27, 2017).

¹⁴ See *B.H., id.*; *M.H.*, Docket No. 17-0210 (issued July 3, 2018).

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective July 18, 2021, because he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the July 29, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 5, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board